

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATIONS OF BIG RIVERS )
ELECTRIC CORPORATION FOR: )
(I) APPROVAL OF WHOLESALE TARIFF )
ADDITIONS FOR BIG RIVERS ELECTRIC )
CORPORATION, (II) APPROVAL OF )
TRANSACTIONS, (III) APPROVAL TO ISSUE )
EVIDENCES OF INDEBTEDNESS, AND )
(IV) APPROVAL OF AMENDMENTS TO )
CONTRACTS; AND OF E.ON U.S. LLC, )
WESTERN KENTUCKY ENERGY CORP. )
AND LG&E ENERGY MARKETING, INC. )
FOR APPROVAL OF TRANSACTIONS )

CASE NO. 2007-00455

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MAY 21 2008

PUBLIC SERVICE COMMISSION

PETITION FOR CONFIDENTIAL TREATMENT

E.ON U.S. LLC ("E.ON U.S."), Western Kentucky Energy Corp. ("WKEC") and LG&E Energy Marketing, Inc. ("LEM") (the "E.ON Entities"), by counsel, for their Petition for Confidential Treatment filed pursuant to 807 KAR 5:001, Section 7 and KRS 61.878(1)(c), state as follows:

BACKGROUND

By this Petition, the E.ON Entities request that the Public Service Commission ("Commission") grant confidential protection to specified information (the "Confidential Information") in that certain handout (the "Handout"), presented to Commission Staff during that portion of the May 9, 2008 Informal Conference from which persons not having signed a confidentiality agreement were excused, and entitled "Creditor Consent Update As Filed in Supplemental Data Response Filed May 2, 2008." Specifically, the Confidential Information concerns specific financial details with regard to consideration to be paid by the E.ON Entities to secure the consents of certain interested, non-jurisdictional parties to the transaction that is the

subject of this case. The Confidential Information is proprietary information relevant to the financial transactions of unregulated entities. Thus, it is similar to information previously filed herein by the E.ON Entities under confidential seal in this case. The E.ON Entities submit that the Confidential Information filed today also is entitled to confidential protection and for the same reasons.

### **GROUNDS FOR PETITION**

1. KRS 61.878(1)(c) protects commercial information, generally recognized as confidential or proprietary, if its public disclosure would cause competitive injury to the disclosing entity. Competitive injury occurs when disclosure of the information would give competitors an unfair business advantage. The Commission has taken the position that the statute and the regulation require the party requesting confidentiality to demonstrate actual competition and the likelihood of competitive injury if the information is disclosed. Here, there is actual competition, as the Confidential Information is commercial and proprietary information related to the transactions between E.ON Entities' nonregulated business and other non-jurisdictional, non-regulated counter-parties that is competitive and that is not rate-protected by the regulatory compact. Public disclosure of the Confidential Information would enable the E.ON Entities' competitors to discover, and make use of, confidential information concerning the E.ON Entities' financial and business strategies, to the unfair competitive disadvantage of the E.ON Entities.

2. The Confidential Information is maintained internally by the E.ON Entities and by other parties to this case who have a business need to know this information. This information is not on file with the FERC, SEC or other public agency, is not available from any commercial or other source outside of the E.ON Entities and the parties to this case with a business need to know this information, and is limited in distribution to those employees who

have a business reason to have access to such information. Further, the information concerns the E.ON Entities' nonregulated rather than regulated activities. By imposing unfair competitive injury upon the E.ON Entities, disclosure in fact would harm the public interest.

3. Disclosure of the information sought to be protected in this matter would make available to the E.ON Entities' competitors information concerning their financial and business strategies that such competitors could use to the E.ON Entities' competitive disadvantage. The E.ON Entities' competitors are not required to file, or to make public, similar proprietary information.

4. The Confidential Information is precisely the sort of information meant to be protected by KRS 61.878(1)(c)1. In *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766 (Ky. 1995), the Kentucky Supreme Court held that financial information submitted by General Electric Company with its application for investment tax credits was not subject to disclosure simply because it had been filed with a state agency. The Court applied the plain meaning rule to the statute, reasoning that “[i]t does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is ‘generally recognized as confidential or proprietary.’” *Id.* at 768. Similarly, the Kentucky Supreme Court applied the KRS 61.878(1)(c)1. “competitive injury” exemption to financial information that was in the possession of Kentucky’s Parks Department in *Marina Management Services, Inc. v. Commonwealth, Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995): “These are records of privately owned marina operators, disclosure of which would unfairly advantage competing operators. The most obvious disadvantage may be the ability to ascertain the economic status of the entities without the hurdles systematically associated with acquisition of such information about privately owned organizations.” The same reasoning applies here. Moreover, the damage

that would accrue to the E.ON Entities would be exacerbated by the interstate nature of the competition in the wholesale power market. Competitors in this market are not subject to Commission regulations regarding the filing of sensitive financial information.

5. The Confidential Information merits confidential protection pursuant to *Hoy, Marina Management*, and KRS 61.878(1)(c)1. If the Commission disagrees, however, it must hold an evidentiary hearing to protect the due process rights of the E.ON Entities and supply the Commission with a complete record to enable it to reach a decision with regard to this matter. *Utility Regulatory Commission v. Kentucky Water Service Company, Inc.*, Ky. App., 642 S.W.2d 591, 592-94 (1982).

6. The E.ON Entities have provided the Confidential Information to the Attorney General pursuant to a protective agreement.

7. In accordance with the provisions of 807 KAR 5:001(7), the E.ON Entities file herewith, under seal, one (1) highlighted version of the Handout and also file an original and ten copies of the Handout with the Confidential Information redacted for placement in the public record.

#### CONCLUSION

For the reasons stated, the E.ON Entities respectfully request that the Commission grant confidential protection for the information at issue, or schedule an evidentiary hearing on all factual issues while maintaining the confidentiality of the information pending the outcome of the hearing.

Dated: May 20, 2008

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Petition for Confidential Treatment and a copy of the redacted information filed on this date was served via U.S. mail, first-class, postage prepaid, this 20th day of May, 2008, upon the following persons:

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